Supreme Court, U.S.
FILED
MAY 31 1995
CLERK

(3)

No. 94-1611

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

Haitian Refugee Center, Inc., et al.

Petitioners,

VS.

Warren Christopher, Secretary of State, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS, CUBAN AMERICAN BAR ASSOCIATION, INC., et al.

Counsel:

Marcos D. Jiménez, Esq.
Ann St. Peter-Griffith, Esq.
WHITE & CASE
200 S. Biscayne Boulevard
Suite 4900
Miami, Florida 33131
(305) 371-2700

Roberto Martínez, Esq.
GREENBERG TRAURIG
1221 Brickell Avenue
Miami, Florida 33131

Counsel of Record:

Elliot H. Scherker, Esq.
GREENBERG TRAURIG
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500

Of Counsel:

Harold Hongju Koh, Esq.
ALLARD K. LOWENSTEIN
INTERNATIONAL HUMAN
RIGHTS LAW CLINIC
127 Wall Street
New Haven, CT 06511
(203) 432-4932

27pp

QUESTIONS PRESENTED

Whether U.S. government officials may deny the Cuban American Bar Association, Inc. and other American pro bono counsel, based upon the content of their speech, access to the Cuban refugees being detained at the United States Naval Base in Guantánamo Bay, Cuba, because, in the lower court's view, the detainees have no rights and therefore no need for counsel.

Whether numerous illegal acts by the Immigration and Naturalization Service and the Attorney General against Cuban refugees detained on Guantánamo are wholly beyond constitutional scrutiny when the detainees are located at a U.S. naval base that is, by perpetual lease, subject to the exclusive jurisdiction and control of the United States.

PARTIES TO THE PROCEEDINGS

The Petitioners are provisional intervenors in the case below, the Haitian Refugee Center, Inc. ("HRC"), and Gary Joseph, Paulomme Edmond, Pierre Onel Antoine, Voidieu Jean Louis, Bergeline Jean Louis, and Padeci Jean Louis, each of them on behalf of themselves and all others similarly situated.

The named Respondents are the defendants in the case below, Warren Christopher, Secretary of State; William J. Perry, Secretary of Defense; Janet Reno, Attorney General; Brigadier General Michael Williams, Commander, Joint Task Force at United States Naval Base, Guantánamo Bay, Cuba; Doris Meissner, Commissioner, Immigration and Naturalization Service; and the Immigration and Naturalization Service.

Sul mitting this response are the plaintiffs in the case below, Cuban American Bar Association, Inc. ("CABA"); Cuban Legal Alliance, Inc.; Due Process, Inc.; Lizbet Martinez; Arianna Gonzalez Nobaez; Arniel del Campo Gonzalez; Jovani Miguel Fiffe Pino; Nestor Rodriguez Labori; Nelson Torres Pulido; Maritza Exposito; David Buzzi; Alberto Rodriguez Garcia; Leydis Milagros Ruiz Mendez; Elena Pino; and Virginia Perez; on behalf of themselves and all others similarly situated (hereafter the "CABA Respondents").

OPINIONS BELOW

The decision giving rise to the Petition, dated January 18, 1995, is reported as *Cuban American Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412 (11th Cir. 1995). The panel did not, however, issue the mandate forthwith, because the Cuban and Cuban-American plaintiffs (the CABA Respondents) timely filed a suggestion for rehearing *en banc*, which the panel denied on April 18, 1995. On April 27, 1995, the panel issued its judgment as mandate for Case Nos. 94-5138, 94-5231 and 94-5234, vacating the district court's orders and remanding the cases with directions to dismiss the plaintiffs' claims. Petitioner in this case, the provisional Haitian intervenors, did not seek rehearing before the panel, and thus filed the instant Petition on March 31, 1995. On May 4, 1995, this Court extended until May 31, 1995, the time for all Respondents to respond to the Haitian intervenors' Petition.

The district court's temporary restraining order ("TRO") of October 31, 1994, in favor of the CABA Respondents was limited to only two of the eleven claims for relief in CABA's complaint: the issues of access to counsel and involuntary repatriation. The TRO allowed CABA and other American attorneys reasonable and meaningful access to their clients on Guantánamo and prevented the coerced repatriation of Cuban refugees held there. CABA App. at 1a.[1] On November 7, 1994, the panel unanimously denied the Government's motion for summary reversal of the TRO and partially granted the Government's motion for stay pending appeal. The panel ordered the Government to provide reasonable and meaningful access to counsel for the named plaintiffs and other detainees who requested counsel by written declaration, and enjoined all repatriations except those of detainees who expressed in writing a desire to be returned to "sovereign Cuba." App. at 29a.

---

[1] "CABA App." references are to CABA's Appendix attached hereto.

With these modifications, the CABA Respondents are satisfied with and hereby adopt the "Opinions Below" section of the Haitian intervenors' Petition.

STATEMENT OF FACTS AND OF THE CASE

Except as set forth below, the CABA Respondents accept the statement of the case set forth in the Haitian intervenors' Petition, with the caveat that the CABA Respondents lack personal knowledge as to the facts relating solely to the Haitian refugees. While the CABA Respondents fully support the equal treatment of, and humanitarian parole for, the remaining Haitian minors on Guantánamo, they disagree with any statements in the Petition that might be interpreted as calling into question the repressive and totalitarian regime of Fidel Castro, from whom approximately 32,000 Cubans fled in the summer of 1994. See Petition at 9.

In this litigation, the U.S. Government conceded below in the Declaration of former Ambassador Michael Skol, Principal Deputy Assistant Secretary of State for Inter-American Affairs, that any repatriation of Cuban refugees to the Castro regime was and is unacceptable because, among other reasons, Cuba is a "totalitarian state controlled by President Fidel Castro," has a government that "sharply restricts basic political and civil rights," and is a place where "[h]uman rights activists and dissidents are often imprisoned." CABA App. at 13a. The CABA Respondents will set forth additional facts relevant to the Cuban refugees in their own petition for writ of certiorari, which is not due until July 17, 1995.

Furthermore, certain important events have occurred since the filing of the Haitian intervenors' Petition. First, on May 2, 1995, the U.S. Government announced a sharp change in policy concerning the Cuban refugees at Guantánamo. CABA App. at 15a. Under the new policy, the United States will grant humanitarian parole to all nonexcludable Cuban refugees detained at Guantánamo, including all named Cuban plaintiffs

here. Second, on May 19, 1995, the U.S. Government further announced that it would grant humanitarian parole to Haitian minors being held at Guantánamo on a case-by-case basis, as warranted by the best interests of the particular child, and that in any event, all unaccompanied Haitian minors would leave Guantánamo by June 30, 1995. CABA App. at 19a.

ARGUMENT

This Court should defer any ruling on the instant Petition until the CABA Respondents submit their own petition, or, in the alternative, grant the Petition for argument in tandem with the CABA case.

The CABA Respondents fully support the grant of certiorari with respect to the questions presented here. As Haitian intervenors explain in their Petition, the Eleventh Circuit's erroneous decision conflicts with decisions of this Court and other circuits, and raises legal questions of national importance meriting this Court's plenary review. The CABA Respondents plan to file expeditiously their own petition for writ of certiorari to review the panel's final judgment issued April 27, 1995. Among other things, the CABA Petition will address whether the Government's new policies towards Cuban refugees and Haitian minors render moot the claims raised by CABA and the Haitian parties.

The HRC Petition and the CABA Petition will present several common questions. Like the Haitian intervenors, the CABA Respondents will brief the issue whether the Government may engage in content-based discrimination against the speech of American lawyers who seek to counsel refugees indefinitely detained at Guantánamo. The CABA Respondents will also examine whether the Government may deny innocent refugees their constitutional and other rights under U.S. law by detaining them arbitrarily on Guantánamo, territory that is perpetually subject to the complete and exclusive jurisdiction and control of the United States. Due to

this commonality of issues, and the very real possibility that policy changes will render the entire case moot, the CABA Respondents respectfully request that this Court defer any ruling on the instant Petition until it considers the forthcoming CABA Petition. Given that the CABA Respondents were plaintiffs in the case-in-chief, this Court should not, in any event, deny review of this petition until the CABA Respondents have had an opportunity to present their own petition stating why certiorari is warranted. Should the Court choose to grant review of the HRC Petition at this time, the CABA Respondents respectfully request that CABA's forthcoming petition also be granted, and the two cases set for argument in tandem. Should that circumstance arise, the CABA Respondents would support this Court's plenary review of both the issues common to the two petitions and those issues that are unique to the HRC Petition.

Respectfully Submitted,

Marcos D. Jiménez, Esq.
Ann St. Peter-Griffith, Esq.
WHITE & CASE
200 S. Biscayne Boulevard
Suite 4900
Miami, Florida 33131
(305) 371-2700

Roberto Martínez, Esq.
Elliot H. Scherker, Esq.
GREENBERG TRAURIG
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500

Harold Hongju Koh, Esq.
Allard K. Lowenstein
INTERNATIONAL HUMAN
RIGHTS LAW CLINIC
127 Wall Street
New Haven, CT 06511

Index to Appendices

Page

A. Order Granting Plaintiffs' Emergency Motion for Temporary Restraining Order 1a

B. Excerpts from Declaration of Michael Skol, Principal Deputy Assistant Secretary of State for Inter-American Affairs, Department of State, dated November 23, 1994 ..... 13a

C. Statement of Attorney General Janet Reno Regarding Cuban Migration, dated May 2, 1995 ..... 15a

D. Excerpts from Letter of Amy Jeffress, Office of the Deputy Attorney General, to Professor Harold H. Koh, dated May 19, 1995 ..... 19a

Appendix A

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CUBAN AMERICAN BAR ASSOCIATION, et al.

Plaintiffs,

v.

WARREN CHRISTOPHER, et al.,

Defendants,

Case No. 94-2183-CIV-ATKINS

ORDER GRANTING PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

THIS CAUSE comes before the court on Plaintiffs' Emergency Motion for Temporary Restraining Order filed on October 24, 1994. In their Motion, plaintiffs ask this Court to enjoin temporarily the government from denying plaintiff "Cuban Refugee Service Organizations [(CRSOs)] and other lawyers" access to and communication with their clients; to order the government to provide the CRSOs reasonable access; and to enjoin involuntary repatriation of the detained plaintiff refugees to Cuba.

The court held a hearing on plaintiffs' motion on Wednesday, October 26, 1994. Both parties were represented at the hearing and presented arguments. At the close of the hearing, the court advised the parties that it would take the

matter under consideration. A review of the record suggests that a temporary restraining order is warranted in this case.

FACTUAL BACKGROUND

The genesis of this case goes as far back as 1960 and Fidel Castro's institution of a Communist regime in Cuba. Since that time, the United States has had a favorable policy towards Cubans fleeing Castro's totalitarian regime. This policy granted the Cubans refuge and asylum in the United States, eventually leading to permanent residence and citizenship.[1] At that time, and up to the recent past, the Cuban government prohibited Cubans from leaving for the United States. However, in August of 1994, the Cuban government rescinded this policy and began allowing Cubans to leave for the United States by the thousands. As a result, on August 19, 1994, President Clinton announced at a press conference that no more Cubans would be allowed into the United States and that any Cubans found at sea would be detained in Guantanamo Bay.

On September 9, 1994, as a result of negotiations between the governments of the United States and the Republic of Cuba, the two governments signed a Joint Communiqué designed to ensure that migration procedures were safe and legal. The agreement will allow 20,000 Cubans entry into the United States each year. Those given permission to enter will consist of persons who qualify as refugees and their families, persons issued visas and their families and persons who are selected based on a "lottery" system. However, in order to receive any benefit from this agreement, the Cubans must return to Cuba and invoke the procedures established by recent negotiations between the United States and Cuba. Until they voluntarily decide to return, they will be held in safe havens like

---

[1] *See* Cuban Democracy Act, 22 U.S.C. § 6001 *et seq.*; Refugee Act of 1980, 8 U.S.C. § 1521 and Cuban Adjustment Act, 8 U.S.C. § 1255.

Guantanamo Bay. At present, the government has repatriated 42 refugees and is ready to repatriate as many as 1,014 more.

On October 11, 1994, the CRSOs and other attorneys asked the United States government for access to refugees at Guantanamo. At an October 20, 1994 meeting between the CRSOs and government representatives, the CRSOs were informed that some access would be allowed, but no specifics were given. On October 23, 1994, the CRSOs and certain detained refugees filed suit against the government alleging that the government was denying the attorneys and the detained refugees certain statutory, Constitutional and international law rights.[2] On October 24, 1994, the government sent a letter to plaintiff attorneys granting up to six attorneys access to refugees at Guantanamo for two days. Meanwhile, the plaintiffs ask this Court to enjoin the government from denying the CRSOs unlimited access to their clients and from repatriating any more refugees before the attorneys have an opportunity to consult with them and ensure that their decision to return to Cuba is voluntary. Counsel do not dispute that refugees may repatriate of their own free will at any time. The issue is whether the detained plaintiff refugees taken by the government to Guantanamo Bay, over which area the government has complete control and jurisdiction, are entitled to advice of counsel to assure their 'voluntary' decision to repatriate.

---

[2] The plaintiffs base their claims on certain sections of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*; the Cuban Adjustment Act of 1966, 8 U.S.C. § 1255; the Refugee Act of 1980, 8 U.S.C. § 1521; the Administrative Procedure Act 5 U.S.C. § 551 *et seq.*; the First and Fifth Amendments of the United States Constitution, and various principles of international law.

This Court has jurisdiction based on 28 U.S.C. § 1331; 8 U.S.C. § 1329; 5 U.S.C. § 702 and 28 U.S.C. §§ 2201, 2202.

DISCUSSION

This court may enter preliminary injunction relief, such as a temporary restraining order, only if the movant shows all of the following: (1) a substantial likelihood of prevailing on the merits; (2) that it will suffer irreparable injury if the relief is not granted; (3) that this irreparable harm outweighs the harm the relief might cause the non-movant; and (4) that the relief would not be adverse to the public interest. *Haitian Refugee Center v. Nelson*, 872 F.2d 1555, 1561-62 (11th Cir. 1989), *aff'd*, 111 S. Ct. 888 (1991).

(1) Likelihood of Prevailing on the Merits

As previously mentioned, the plaintiffs' claims are based on various statutory, Constitutional and international law principles. The plaintiffs' main contention, for purposes of this Motion,[3] is that the government is denying the attorneys their First amendment rights and the detained plaintiff refugees substantive and due process rights by denying them access to their attorneys. Consequently, the plaintiffs argue that the "voluntary" repatriation of the refugees cannot in fact be voluntary absent the advice of counsel and informed consent. In support of their position, the plaintiffs ask this Court to consider *Haitian Centers Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993) (hereinafter *Sale*).

---

[3] The court emphasizes that it does not state any opinion regarding policies towards Cuba or conditions at Guantanamo. The scope of this Order is limited to the issues of right to access and voluntary repatriation. As plaintiffs argue, there are two key elements to voluntariness: full information so as to have informed consent and a non-coercive environment, such as adequate living conditions. At this stage, the court is only considering the issue of right to access and whether the Cuban refugees are being denied the opportunity to be fully informed, thus, preventing voluntary repatriation. The issue of adequate living conditions will be examined at a later stage, if necessary.

In response to these claims, the government argues that the detained plaintiff refugees have no substantive legal rights and, thus, the attorneys have no First Amendment right to access to them. Furthermore, even assuming the existence of a First Amendment right, that right does not mandate that the government assist the attorneys in advising their putative clients. Additionally, the government argues that the refugee's repatriation decisions are made voluntarily after full disclosure of their options. To support its arguments, the government relies on *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549 (1993) (hereinafter *HCC*) and *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498 (11th Cir.), *cert. denied* 112 S. Ct. 1245 (1992) (hereinafter *Baker*).

The court's review of these arguments in light of the relevant law suggests a substantial likelihood that plaintiffs ultimately will prevail. First, the rules set forth in *Sale* support the plaintiffs' position. The Haitian plaintiffs in the *Sale* case asserted causes of action very similar to those asserted by the detained plaintiff refugees.[4] Additionally, *Sale* and the present case have several controlling factual similarities: 1) both the Haitians and the Cubans are being detained in Guantanamo; 2) the attorneys for both requested permission to communicate with their clients; 3) in both situations, other groups were

---

[4] Specifically, they alleged

> 1) denial of the Haitian Service Organizations' First Amendment rights to provide advocacy and counselling to their clients detained in Guantanamo; 2) denial of the Haitian detainees' First and Fifth Amendment constitutional rights to obtain and communicate with counsel; 3) denial of the Haitian detainees' constitutional due process right to adequate medical care, to be free of indefinite detention and arbitrary punishment; 4) failure of the Government to follow rulemaking procedures; 5) arbitrary and capricious agency action not in accordance with the law; 6) judicial enforceability of the duty of non-refoulement; and 7) equal protection.

Sale, 823 F. Supp. at 1034.

allowed contact and communications with the detainees, indicating possible viewpoint discrimination, and 4) the attorneys in both cases sought and seek to communicate with their clients at their own expense, not the government's. Based on this similar set of facts, the *Sale* court found that:

1. The United States has complete jurisdiction and control over Guantanamo Bay and, thus, the First Amendment applies there. *Id.* at 1036, 1040.

2. The government's decision to deny Haitian Service Organizations (HSO) access to the detainees "is based solely on the content of what they had to say and the viewpoint they would express," *id.* at 1036, in violation of the First Amendment. *Id.* at 1041. Furthermore, the HSOs' First Amendment right does not depend on whether the detainees have a right to counsel. *Id.*

3. That the Haitians have due process rights because they "are at a military base solely because the defendants chose to take them there . . . . If the Due Process Clause does not apply to the detainees at Guantanamo, Defendants would have discretion deliberately to starve or beat them, to deprive them of medical attention, to return them without process to their persecutors, or to discriminate among them based on the color of their skin." *Id.* at 1042.

4. That the detainees had a right to review under the Administrative Procedure Act. *Id.* at 1045-49.

Therefore, it appears to this Court that the *Sale* decision suggests a substantial likelihood that plaintiffs ultimately will prevail. Notably, no appeal was taken from that ruling.[5]

---

[5] Two of the defendants in *Sale* were Warren Christopher, Secretary of State, and Janet Reno, Attorney General, who are also defendants in this action *sub judice*.

Second, the cases that the government relies on for support contain significant factual distinctions. The government relies on *HCC* for the assertion that "the Supreme Court has held that section 243(h) of the [Immigration and Naturalization Act], which the plaintiffs claim prohibits the Attorney General from repatriating Cubans from Guantanamo, does not apply to extraterritorial actions or procedures." Defendant's Opposition to Plaintiffs' Request for Injunctive Relief at 2.[6] A careful reading of *HCC* shows that this case dealt with Haitians being interdicted by the Coast Guard on the highs seas and returned to Haiti pursuant to an Executive Order. The Court reviewed the history of both § 234(h) and Article 33 of the United Nations Convention Relating to the Status of Refugees[7] and determined that they only apply to aliens who have already been admitted to the United States or are already *within United States territory but not yet admitted.* Accordingly, the Court concluded that neither provision placed any limitations on the

---

[6] Section 243(h) provides in pertinent part:

> (1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.
>
> . . .

Immigration and Naturalization Act § 234(h), as amended, 8 U.S.C. § 1253(h).

[7] Article 33.1 states:

> 1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> . . .

Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 6276, T.I.A.S. No. 6577.

President's authority to repatriate aliens *intercepted on the high seas*. *HCC* has no bearing on the present case, where the refugees are not on the high seas but rather within United States territory at Guantanamo Bay.

The government also relies on *Baker*. There, the Eleventh Circuit determined that Haitian refugees on Coast Guard cutters had no substantive legal rights. Consequently, the attorneys for the Haitians had no First Amendment right to access and advise their clients because that right was "predicated upon the existence of an underlying legal claim that may be asserted by the potential litigant." *Baker*, 953 F.2d at 1513. The court further concluded that even assuming the attorneys have some right of access, the Constitution does not require the government to assist the attorneys in obtaining that access. While these rulings facially appear to be binding on the present case, the factual distinctions between *Baker* and the present case indicate that the opposite is true.

The first significant distinction is that *Baker* focuses on the Haitian refugees located on Coast Guard cutters outside United States territory.[8] Conversely, the detained plaintiff refugees are located at Guantanamo, a United States territory. The fact that the Haitian refugees where [sic] on the high seas led to the *Baker* court's ultimate determination that they had no substantive rights and, thus, the attorneys had nothing on which to base their First Amendment right to associate with and advise the Haitians. That is not the case here. As the *Sale* decision indicates, once the Cuban refugees where detained in Guantanamo, they became entitled to certain due process and substantive rights, which serve as a predicate to the CRSOs' First Amendment claim in this case.

---

[8] *See Baker*, 953 F.2d 1512, 1515 (Hatchett, J., dissenting) ("For the majority, that is the heart of the matter; the refugees are outside of the United States.")

Another distinction is the fact that the plaintiffs in *Baker* did not allege any viewpoint discrimination.[9] The opposite is true here. The detained plaintiff refugees, like in *Sale*, are alleging that while they are being denied access to and communication with the refugees, other groups are not, resulting in viewpoint discrimination by the government.

A third vital distinction is that the *Baker* plaintiffs were asking the government for assistance in obtaining access to the refugees at extreme cost to the United States. The court presumed that this meant finding and funding transportation to the cutters or bringing the Haitians ashore, concluding that such assistance "would impose a substantial burden on the United States." *Id.* at 1514. No such burden exists here. The CRSOs have repeatedly indicated that they are ready to provide transportation and shelter at their own expense. All they ask of the government is to provide access and a forum. In light of the fact that the government has given permission for six attorneys to travel to Guantanamo for two days, there does not appear to be any substantial burden on the government.

Having determined, for purposes of the present inquiry, that the *Sale* case is most factually related to the present case and that the cases the government relies on are inapplicable because of material distinctions, the court finds that the facts demonstrate a substantial likelihood that plaintiffs will prevail on the merits. Accordingly, plaintiffs have satisfied the first requirement for preliminary injunctive relief.

Irreparable Harm

Plaintiffs have demonstrated irreparable injury in the absence of a temporary restraining order in the form of declarations indicating that many detained plaintiff refugees

---

[9] "The district court noted that there was no allegation that the government's denial of access to the interdicted Haitians was the product of viewpoint discrimination." *Baker*, 953 F.2d at 1512 n.7.

may suffer persecution and other negative consequences if repatriated to Cuba. Additionally, irreparable injury will result if these detained plaintiff refugees are repatriated without being afforded their substantive and due process rights. The government has already repatriated forty-two (42) Cuban-refugees. Another one thousand fourteen (1,014) are ready to be processed for repatriation. There is no question in the court's mind that the harm that would result from repatriating these refugees to a country from which they risked their lives to flee, without providing them their rights and determining if their decisions are truly voluntary, is unquestionably irreparable.

Balance of Hardships

In considering the balance of hardships, courts take into account the burdensomeness of a temporary restraining order on the defendants. 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948 at 447 (1973). The court's review of the record suggests that any burden to the government in this case is minimal. The CRSOs have indicated that they are not asking the government to subsidize access to the detained refugee plaintiffs. The only 'burden' on the government is to provide access and the proper forum. In light of the fact that the government has already agreed to limited access, the court finds that this burden is substantially outweighed by the above-described irreparable harm to the plaintiffs.

Disservice to Public Interest

Finally, the government has failed to show, and the record does not reveal, any disservice injunctive relief would cause to the public interest. Therefore, the court finds that no disservice to the public interest would result from the present temporary restraining order.

CONCLUSION

Having considered the filings and oral argument of counsel, it is

ORDERED AND ADJUDGED that:

1. Plaintiffs' October 24, 1994 Emergency Motion for Temporary Restraining Order is **GRANTED** as follows:

(a) Defendants shall refrain from denying Cuban Refugee Service Organizations and other counsel reasonable and meaningful access to the detained refugee plaintiffs; and

(b) Defendants shall refrain from repatriating any detained plaintiff refugees, including those twenty-three (23) persons who were the subject of the temporary restraining Order entered October 25,1994, without permitting them access to counsel and receipt of full information so as to assure an informed and voluntary decision to seek repatriation.

2. Plaintiffs shall deposit, no later than 5:00 p.m. on November 1, 1994, the sum of $500.00 into the court registry to serve as security during the pendency of this Order.

3. Counsel are to submit within five (5) days a proposed agreed plan for the visitation of a requisite number of lawyers for the necessary time to conduct the proposed interviews of the subject refugees. If counsel cannot agree on appropriate details of the arrangements, the court will, on application, consider appointing a Special Master to supervise the proceedings.

4. Counsel are to submit a joint report every 30 days as to the progress in accomplishing the above objectives.

5. This Order will remain in effect until further order of the court. In light of the twenty-four (24) declarations submitted by the parties, the court assumes no further factual development is to be made and the court may proceed to enter a Preliminary Injunction, preserving all objection heretofore

made. However, if counsel desire a further hearing to submit additional, non-duplicative evidence, in support of their respective positions, they are to advise the court in writing within five (5) days of the file date of this Order.

DONE AND ORDERED at Miami, Florida, this ____ day of _____, 1995 at _____.

/s/ C. CLYDE ATKINS
SENIOR UNITED STATES DISTRICT JUDGE

cc: Counsel of record.

Appendix B

Excerpts from Declaration of Michael Skol
Principal Deputy Assistant Secretary of State
for Inter-American Affairs, Department of State
November 23, 1994

11. The situation in Cuba presents a stark contrast to that in Haiti. Cuba remains a totalitarian state controlled by President Fidel Castro, who is Chief of State, Head of Government, First Secretary of the Communist Party, and Commander-in-Chief of the Armed Forces. President Castro exercises control over all aspects of Cuban life through a broad network of directorates ultimately answerable to him through the Communist Party, as well as through the bureaucracy and the state security apparatus.

12. The Government of Cuba sharply restricts basic political and civil rights, including freedom of expression, association, assembly and movement, as well as the right to privacy. The Ministry of the Interior is the principal organ of state security and totalitarian control and is under the *de facto* control of the Revolutionary Armed Forces, which are in turn directed by Fidel Castro's brother, Raul. The Ministry of the Interior vigorously investigates "nonconformity" and actively suppresses organized opposition and dissent against government officials. It maintains a pervasive system of vigilance through undercover agents, informers, "rapid action brigades," and "Committees for the Defense of the Revolution," which are used as a means to mobilize citizens against dissenters, to impose ideological conformity, and to root out "counterrevolutionary" behavior. Human rights activists and dissidents are often imprisoned for offenses such as "enemy propaganda," "illicit association," "contempt for authority," "Dangerousness," or the broad charge of "rebellion." Hundreds or perhaps thousands of Cubans are in prison for various

political crimes, and Cuban government authorities use the threat of prosecution to intimidate many others.

13. The Cuban people have no right to choose their leaders. The only legal political organization is the Communist Party, which is headed by Fidel Castro. Castro or subordinate party officials make all important political decisions. In the 1993 elections for the National Assembly, every candidate had to be screened by a "Candidacy Commission" composed of representatives of party-controlled "mass organizations." Only one candidate per seat was allowed. These procedures ensured that only government supporters would be on the ballot. Voters were given only one option, either to vote "Yes" or to leave the ballot blank. Formation of political parties, campaigning, and making campaign promises were forbidden.

Appendix C

Statement of Attorney General Janet Reno
Regarding Cuban Migration
May 2, 1995

I would like to make an announcement regarding Cuban migration.

It has long been the policy of the United States that Cubans who wish to migrate to the United States should do so by legal means. The U.S. Interests Section in Havana accepts and processes requests for visas, and it also operates an in-country program for those Cubans who seek refugee status for entry into the United States.

Pursuant to this policy, last August I announced that Cubans attempting irregular means of migration to the United States on boats and rafts would not be allowed to enter this country, but rather would be brought to the United States Naval base at Guantanamo Bay, where they would be offered safe haven.

Last September, following negotiations with representatives of the Cuban government, the United States announced that it would increase Cuban migration to the United States to permit 20,000 legal entrants per year. This program, which includes immigrant visas, refugee applications, and a Special Cuban Migration Program designed to broaden the pool of potential entrants, is on target, and we expect to continue legal Cuban migration at this level in the years to come. This year alone, we expect to bring 7,000 Cuban refugees to the United States through our in-country program in Havana.

Following recent diplomatic exchanges with the Cuban government, the United States is now prepared to take another important step towards regularizing Cuban migration between Cuba and the United States.

First, with respect to Guantanamo:

- We will continue to bring to the United States those persons who are eligible for special humanitarian parole under the guidelines announced by the President last October and December.
- The government of Cuba has agreed to accept all Cuban nationals in Guantanamo who wish to return home, as well as persons who have previously been deported from the United States and persons who would be ineligible for admission to the United States because of criminal record, medical, physical, or mental condition, or commission of acts of violence while at Guantanamo.
- All other Cubans in the safe haven will be considered for entry into the United States on a case-by-case basis as "Special Guantanamo Entrants," bearing in mind the impact of paroles on state and local economies and the need for adequate sponsorships. As has been true for all Cubans and Haitians previously paroled into the United States from Guantanamo, sponsorship and resettlement assistance will be obtained prior to entry. The number of these "Special Guantanamo Entrants" admitted to the United States will be credited against the 20,000 annual Cuban migration figure, beginning in September of this year, at the rate of 5,000 per year (regardless of when the Special Guantanamo Entrants are admitted).

Second, with regard to future irregular migration:

- Effective immediately, Cuban migrants intercepted at sea attempting to enter the United States, or who enter Guantanamo illegally, will be taken to Cuba, where U.S. consular officers will assist those who wish to apply to come to the United States through already established mechanisms. Cubans must know that the only way to come to the United States is by applying in Cuba.

- All returnees will be permitted to apply for refugee status at the U.S. Interests Section in Havana. Cuba is one of only three countries in the world in which the United States conducts in-country processing for refugees. The Government of Cuba has committed to the Government of the United States that no one will suffer reprisals, lose benefits, or be prejudiced in any manner, either because he or she sought to depart irregularly or because he or she has applied for refugee status at the U.S. Interests Section. The Cuban Government made a similar commitment in the context of the September 1994 agreement, and we are satisfied that it has been honored. Moreover, the Government of Cuba will permit monitoring by U.S. consular officers of the treatment of all returnees.

- Migrants intercepted at sea or in Guantanamo will be advised that they will be taken back to Cuba, where U.S. consular officials will meet them at the dock and assist those who wish to apply for refugee admission to the United States at the Interests Section in Havana. They will be told that the Government of Cuba has provided a commitment to the United States Government that they will suffer no adverse consequences or reprisals of any sort, and that U.S. consular officers will monitor their treatment. They will also be told that those persons who seek resettlement in the United States as refugees must use the in-country refugee program.

- Measures will be taken to ensure that persons who claim a genuine need for protection which they believe cannot be satisfied by applying at the U.S. Interests Section in Havana will be examined before return.

- Cubans who reach the United States through irregular means will be placed in exclusion proceedings, detained, and treated as are all illegal migrants from other countries.

- The United States Government reiterates its opposition to the use of violence in connection with departure from Cuba and its determination to prosecute cases of hijacking and alien smuggling.

* * * * * * * * *

These new procedures represent another important step towards regularizing migration procedures with Cuba, finding a humanitarian solution to the situation at Guantanamo, and preventing another uncontrolled and dangerous outflow from Cuba.

The United States policy towards Cuba remains the same. We remain committed to the Cuban Democracy Act and its central goal — promoting a peaceful transition to democracy in Cuba. We will continue to enforce the economic embargo to pressure the Cuban regime to reform. We will continue to reach out to the Cuban people through private humanitarian assistance and through the free flow of ideas and information to strengthen Cuba's fledgling civil society. And we remain ready to respond in carefully calibrated ways to meaningful steps toward political and economic reform in Cuba.

Appendix D

Excerpts from Letter of Amy Jeffress
Office of the Deputy Attorney General
to Professor Harold H. Koh
May 19, 1995

Thank you for writing to me about the situation of the Haitian unaccompanied minors in Guantanamo. I would have liked to have responded sooner, but the Department has been working with other federal agencies to address this problem, and I wanted to wait until we reached an acceptable resolution before writing.

We have been working with the United Nations High Commissioner for Refugees and other organizations to ensure that each unaccompanied Haitian minor is placed in the best situation for that particular child. In some cases, especially where the child's parents or closest relatives are in Haiti, the child's best interests call for repatriation to Haiti. In other cases, resettlement in the United State to join family members or other appropriate sponsors best meets the child's needs, and we have authorized parole for these minors. The situation of each minor is being reviewed on a case-by-case basis, a complex process that involves tracing and interviewing family members and conducting home visits.

We understand that the time required for this process of case-by-case review and the resulting prolonged stay of the unaccompanied minors in Guantanamo has raised significant humanitarian concerns. Therefore, we have determined, as of today, to ensure that all of the unaccompanied minors leave Guantanamo by June 30. No unaccompanied minors will remain in Guantanamo after that date, and no minor will be returned to Haiti unless there is a determination that repatriation is in the best interests of that child.